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FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner

v.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, and UTAH INTERNATIONAL, INC.,
Respondents

REPLY BRIEF

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REPLY BRIEF

(a) There is no independent and adequate state law ground supporting the ruling of the Montana Supreme Court.

The opinion below is analogous to the one rendered by the Supreme Court of Ohio and reviewed by this Court in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). The state court there held that a broadcaster's telecast of the petitioner's "human cannonball" act was, *under state law*, a privileged invasion of his common-law "right of publicity", because the broadcaster's actual intent had not been to injure him or to appropriate the benefit of publicity for a private use. In so ruling,

the state court was influenced by two of this Court's First Amendment cases (*id.* at 567).

"There is no doubt", said this Court, "that petitioner's complaint was grounded in state law and that the right of publicity which petitioner was held to possess was a right arising under Ohio law" (*id.* at 566). Nevertheless, because the Ohio court apparently reached its decision in part on the basis of First Amendment principles, this Court granted certiorari and reversed. It did so despite a claim by the respondent that an adequate state law ground supported the decision below. This Court held that the First Amendment did not immunize the telecast from a state-law suit for damages. In so holding, however, the Court made clear that although the First Amendment did not *require* an exoneration of the telecast, "the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case" (*id.* at 578-579).

The teaching of *Zacchini* is that if, in interpreting state law, a state court rests its conclusion upon federal principles or interpretation, this Court has jurisdiction to correct the state court's ruling. And this is true even though the state court, once free of its prior erroneous interpretation of controlling federal law, may reach the same conclusion as before, this time *solely* on the basis of state law.

Similarly, in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), two religious organizations claimed exemption with respect to their school employees from taxes imposed by both federal and state statutes. The South Dakota Supreme Court interpreted the state's own statute as rendering non-profit church-related schools subject to taxation. However, since its interpretation rested in part upon an understanding of the federal statute and the First Amendment, this Court asserted its jurisdiction. It did so "* * * although, literally, [the judgment below] concerns the construction of a state statute" (*id.* at 780 n. 9).

This Court reversed, but stated: "While the South Dakota courts remain free to construe the State's own law differently, they deserve to be made aware of the proper and, here, significant interpretation of the intertwined federal law" (*id.*). To the same effect are *United Air Lines, Inc.* v. *Makin*, 410 U.S. 623, 630-631 (1973), and *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-515 (1939).

All of these cases are directly applicable to the instant one. The Montana Supreme Court did say, as respondents contend, that petitioner "could not prevail even under Montana law."[1] However, when one looks behind that statement, it is clear that the state court's conclusion was intertwined with, and dependent upon, the court's interpretation of the Yellowstone River Compact.[2] Put another way, it is inconceivable that the Montana Supreme Court, once freed from its erroneous interpretation of the Compact, would still hold that respondent Utah's prior filing in Montana was valid.[3] The only reason for that court's

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[1] This statement was *dictum*, addressed to what might happen if the case were returned for a hearing. Since there has never been a factual hearing in this case, the court could not have been ruling directly on whether or not petitioner could prevail upon remand.

[2] This is clear not only from the opinion itself but also from the fact that, as noted above, there has never been any evidentiary hearing in this case and thus no factual record from which any conclusions could be drawn except upon a facial reading of the Compact.

[3] Montana would be free, for example, to rule that under both the Compact and Montana law, petitioner Intake made the first-in-time filing in Montana. This would naturally follow because even respondent Utah does not claim that it originally filed in Montana on that State's forms, as required by Montana law (Utah's Brief, pp. 2-3). As the respondent Montana officials put it (p. 6), the duplicates of Wyoming forms filed in Montana "contained *much of the same information* that is required on Montana forms" (emphasis added; footnote deleted). Montana's courts should be allowed to hold that this was not sufficient.

holding was its assumption that Article VII of the Compact required due deference to Utah's actions. This assumption ignores the mandate of Article XVIII.

In any event, regardless of what the result would be upon remand, the Montana Supreme Court, like the South Dakota Supreme Court in *St. Martin Evangelical Lutheran Church*, "deserve[s] to be made aware of the proper and, here, significant interpretation of the intertwined federal law."

(b) Respondents assert that this case involves nothing more than a private dispute between two companies. This is no more a private dispute than *Zacchini* was a personal contest between the "human cannonball" and a television station. Larger interests are at stake in both instances. The fact that Montana is not in this Court in the position of protecting its own interests is also irrelevant, just as it was of no moment in *Zacchini* that the State of Ohio failed to appear and assert what its courts had a *right* to determine. At issue here is no less than the sovereign power of the State of Montana to control multi-state waters that have been allocated and apportioned to that State by an instrument having the combined weight of federal and State approval under Article I § 10 cl. 3 of the Constitution. Such an issue can hardly be characterized as a private one.

(c) Respondents argue that the Montana Supreme Court "rejected" petitioner Intake's interpretation of Article XVIII. The court did no such thing. It made one fleeting reference to the fact that Intake was relying upon Article XVIII (App. 55a-56a) but then made no further mention of the article. The court did not even attempt to interpret or explain the meaning of Article XVIII, much less show its interrelation with other articles, including the one relied on by respondents, Article VII.

(d) Respondents themselves—unlike the courts below—go to some length in an attempt to explain the meaning of Article XVIII. But there are two problems.

First, the arguments of attorneys may never be used to substitute for, or to fill the gaps in, judicial rulings. *Chiarella* v. *United States*, 445 U.S. 222, 235-237 and n. 21 (1980); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 539-540 and n. 15 (1978). Thus, even if respondents were right in their interpretation, it would do them no good insofar as the inadequacies found in the Montana Supreme Court's decision are concerned. This Court must assume that that court deliberately chose not to adopt the reasoning now put forward by respondents.

The second problem, however, is that respondents are wrong in their interpretation. Article XVIII evidences the intent of Congress and the signatory States to defer to the jurisdiction of a State over waters allocated to it for use under the Compact. Respondents—for the first time in any court—attempt to characterize Article XVIII as simply a restatement of an "extraterritorial jurisdiction doctrine". To the contrary, Article XVIII was designed to assure that the State to which waters have been allocated and apportioned will actually be able to control the use of those waters. It is a deference doctrine, pursuant to which the law of the State to which the waters are allocated and apportioned is deferred on critical issues. This is what Congress and the signatories intended: to defer to a State like Montana in the appropriation, regulation, administration and use of waters allocated and apportioned to that State.

The point is highlighted at page 9 of the respondent Montana officials' brief, where they list what they claim Montana can still do even under respondents' interpretation of the Compact. Notably missing from the list, however, is the one act that is crucial to all others if a State is to exercise effective control over waters apportioned to it: the ability to set dates of priority. Since everyone agrees that "first in time, first in right" controls in Montana, the inability of that State to fix correlative priority

dates is fatal to all other exercises of power. Put another way, forcing Montana to defer to a filing in Wyoming divests Montana of the right to control waters allocated and apportioned to it, because the date of priority of Utah's proposed appropriation has been effectively determined by the application of another State's law. The Compact never intended this subversion of the law of the State of allocation.

(e) This case is important not just to the parties but to the entire doctrine of deference to State law in relation to water rights. It is important that an interstate Compact, formally agreed to by the Congress and three States, be read properly and the rights of those proceeding under it upheld. Today it is Montana's law that is being flouted; tomorrow it may be Wyoming's or that of any other State to which water has been or may be apportioned by interstate compact.

Respectfully submitted,

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